

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America

v.

Okechukwu Peter Ezika,

Defendant.

S5 18 Cr. 117 (KPF)

Order re: Attorney-Client Privilege Waiver (Informed Consent)

WHEREAS Okechukwu Peter Ezika (the “defendant”) has moved to withdraw his guilty plea and to withdraw his waiver of the right to a grand jury indictment (Dkt. Nos. 173-76, 210) on the ground of ineffective assistance of counsel (*see, e.g.*, Dkt. No. 176, at 3, 7-8); and

WHEREAS the Government, after reviewing the motion papers, has concluded that the testimony of the defendant’s former counsel Richard Portale, Esq., will be needed in order to allow the Government to respond to the assertions made in the defendant’s reply (*see* Dkt. No. 210, at 2) and supporting declaration (*see* Dkt. No. 210-1, at ¶ 6); and

WHEREAS the Court, after reviewing the defendant’s reply and supporting declaration (*see* Dkt. No. 210, at 2; Dkt. No. 210-1, at ¶ 6), is satisfied that the testimony of Mr. Portale is needed in order to allow the Government to respond to the assertions made therein; and

WHEREAS by making those assertions in support of his motion, the defendant has waived the attorney-client privilege as a matter of law; and

WHEREAS the Court is cognizant that, absent court order or informed consent, ethical concerns may inhibit Mr. Portale from disclosing confidential information relating to a prior client even in the absence of a privilege, *see, e.g.*, ABA Standing Comm. on Ethics and Prof. Responsibility Formal Op. 10-456 (July 14, 2010), *Disclosure of Information to Prosecutor When Lawyer’s Former Client Brings Ineffective Assistance of Counsel Claim*,

IT IS HEREBY ORDERED that the defendant's current counsel shall serve upon the defendant a copy of this Order and the accompanying "Attorney-Client Privilege Waiver (Informed Consent)" form. The defendant shall execute and current defense counsel shall file on ECF within fourteen (14) days from the date of this Order the accompanying "Attorney-Client Privilege Waiver (Informed Consent)" form;

IT IS FURTHER ORDERED that, after the executed "Attorney-Client Privilege Waiver (Informed Consent)" is filed by the defendant's current counsel on ECF, Mr. Portale shall give sworn testimony, in the form of an affidavit, addressing the allegations of ineffective assistance of counsel made by the defendant, and provide all documents relevant to those allegations to the Government; and

IT IS FURTHER ORDERED that the Government shall file its sur-reply and a declaration from Mr. Portale, along with any relevant documents he may provide to the Government, on or before 30 days from the date on which defendant files the executed "Attorney-Client Privilege Waiver (Informed Consent)."

Dated: New York, New York
January 10, 2020

A handwritten signature in blue ink, reading "Katherine Polk Failla".

HONORABLE KATHERINE POLK FAILLA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America

v.

Okechukwu Peter Ezika,

Defendant.

S5 18 Cr. 117 (KPF)

Attorney-Client Privilege Waiver (Informed Consent)

To: Okechukwu Peter Ezika

You have made a motion to withdraw your guilty plea and to withdraw your waiver of the right to a grand jury indictment (Dkt. Nos. 173-76) on the ground of, among other things, ineffective assistance of counsel by your former attorney, Richard Portale, Esq. (*see, e.g.*, Dkt. No. 210, at 2). The Court has reviewed your papers and determined that it needs to have a sworn testimonial statement from Mr. Portale in order to evaluate your motion.

By making assertions that Mr. Portale has rendered ineffective assistance of counsel, you have waived the attorney-client privilege you had with Mr. Portale to the extent relevant to determining your claim. This means that if you wish to press your claim of ineffective assistance, you cannot keep the communications between yourself and Mr. Portale a secret—you must allow them to be disclosed to the Government and to the Court pursuant to court order. The court has already issued an Order ordering Mr. Portale to give such testimony, in the form of an affidavit. This Informed Consent form is designed to ensure that you fully understand and agree to this.

Specifically, if you wish to proceed with your motion on the basis that you received ineffective assistance of counsel, you must sign this statement and return it to the Court. The form constitutes your authorization to Mr. Portale to disclose confidential communications (1) only in response to a court order and (2) only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised in your submissions to the Court in support of your motion.

You should know that if you sign this authorization, you run the risk that Mr. Portale will contradict your statements about his representation of you. However, you should also know that the Court may deny your motion if you do not authorize Mr. Portale to give an affidavit in response to the Court's attached Order.

You must return this form, signed by you and notarized, within fourteen (14) days from the date of the Court's Order directing your former lawyer to give testimony. If the Court does not receive this form, signed by you and notarized, within that time, the Court may deny your motion.

NOTARIZED AUTHORIZATION

I have read the Court's Order dated _____ and this document headed Attorney-Client Privilege Waiver (Informed Consent). I hereby authorize my former attorney, Richard Portale, Esq., to comply with the Court's Order by giving testimony, in the form ordered by the Court, relating to my motion to withdraw my guilty plea and to withdraw my waiver of the right to a grand jury indictment on the ground of ineffective assistance of counsel. This authorization allows Mr. Portale to testify only pursuant to court order, and only to the extent necessary to shed light on the allegations of ineffective assistance of counsel that are raised by my motion.

Dated: _____

Sworn to before me this _____ day of _____, 2020

Notary Public